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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. 955.

[redacted], PLAINTIFF IN ERROR,

vs.

E. F. LATIMORE.

[redacted] OF THE STATE OF CALIFORNIA.

[redacted], 1903.

SUPREME COURT OF THE UNITED STATES.

No. 953.

B. POPPE, PLAINTIFF IN ERROR,

vs.

B. F. LANGFORD.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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NOV 26 1881

IN THE

United States Supreme Court,

OCTOBER TERM, A. D. 1881.

NANNIE H. BLAIR,
Plaintiff in Error,

vs.

FRANKLIN D. GRAY,
Defendant in Error.

No. 207.

BRIEF OF PLAINTIFF IN ERROR.

E. A. OTIS,
Attorney for Plaintiff in Error.

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1881.

IN THE

United States Supreme Court,

OCTOBER TERM, A. D. 1881.

NANNIE H. BLAIR ET AL,
Plaintiff in Error,

vs.

FRANKLIN D. GRAY,
Defendant in Error.

No. 207.

This record presents the single question, whether the defendant, who was a stockholder in the Republic Life Insurance Company, is liable under its charter to a suit at law by one of its creditors.

The action was brought by the plaintiff in the Circuit Court of the United States for the Northern District of Illinois; a demurrer was interposed by the defendant to the declaration, which was sustained by the Court below, and final judgment for the defendant, from which the plaintiff has prosecuted this writ of error. The declaration alleges, in substance, the issuance of a policy of insurance on the life of the plaintiff's intestate, the death of the assured during the life of the policy, the adjustment of the loss by the company and its refusal to pay—the company having become insolvent about the time the loss matured.

It is also stated that the defendent was a stock-

holder in the company and had subscribed to its stock to the amount of $10,000, of which he had actually paid in only $2,000; and under the sixth section of the charter it is claimed that the defendant is liable to the plaintiff, who is a creditor of the company, to the amount of the unpaid stock held by him. The whole controversy turns on the charter of the company, of which the defendent was a shareholder, and which is as follows:

"An Act to incorporate the Republic Life Insurance Company of Chicago.

§ 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that Charles B. Lawyer, William V. Kay, Randall W. Smith, John H. Avery, Edward K. Rogers, William G. Hibbard, C. B. Farwell, and C. N. Shipman, and their associates, successors and assigns, be and they are hereby created a body corporate and politic, under the name and style of the "Republic Life Insurance Company of Chicago, Illinois," and by that name shall have and enjoy all the rights, privileges and immunities which are necessary to accomplish the purposes of this act, and be recognized in all courts of justice and equity in the State, for the term of fifty years from and after the passage of this Act.

Provided, that if the corporation created by this Act shall not organize within one year from the passage thereof, then this shall become null and void.

§ 2. The capital stock of said corporation shall be five hundred thousand dollars, and may be increased at the discretion of a majority of the stockholders, whose stock shall be represented at any annual meeting, and shall be divided into shares of

one hundred dollars each, which shall be assignable and transferable only on the books of the company, under such directions as the directors may establish.

§ 3. When the said parties and their associates shall have subscribed one hundred thousand dollars, and shall have paid in five dollars on each share as a company fund, and organized by choosing three or more directors, and those directors shall have chosen one of their number president, and appointed a secretary and treasurer, and filed a certificate of the same, under the seal of the company, signed by the secretary and president, in the office of the Secretary of State, it shall be deemed fully organized, and enjoy all the powers herein conferred.

§ 4. Said corporation shall have power to make and put in operation all such by-laws and regulations as they may deem proper for the well ordering of its affairs; *Provided*, that they be not repugnant to the laws of the United States or of this State.

§ 5. Said corporation shall have full power and authority to take risks and make insurance on the lives of individuals, and to grant, purchase or dispose of annuities, and to do all other acts and things necessary and incident to the transaction of a life-insurance business, either upon the stock or mutual plan, or both; and to loan their surplus or unemployed capital or money on personal, real or other securities, at such rates of interest as may be done under existing laws of the State, or invest the same in United States bonds, and to purchase such real estate and erect such buildings as may be nec-

esssary and convenient for the transaction of their business.

§ 6. The real and personal property of each individual stockholder shall be held liable for any and all liabilities of the company, to the amount of stock subscribed or held by him and not actually paid in. In all cases of losses exceeding the means of the corporation, each stockholder shall be held liable to the amount of unpaid stock held by him.

§ 7. The business of the company shall be carried on in the city of Chicago and elsewhere by agencies, as the directors shall direct.

§ 8. The stock and affairs of said corporation shall be managed by three or more directors, who shall be stockholders of said corporation. They shall, after the first year, be elected annually, and shall hold their offices until others shall be chosen to supply their places. Ten days' notice shall be given of each election to each stockholder by public advertisement or personal notice, and shall be made by ballot by the majority of stock, allowing one vote for each share, either by person or proxy, and in case of the death or resignation of the president or any director, the vacancy may be filled by the board of directors or by election of the stockholders, due notice being given.

§ 9. This act shall be deemed a public act, and shall be construed liberally for the purpose herein granted, and shall take effect and be in force from and after its passage.

Approved March 27, 1869.

The principles which must control the decision in this case, have been the subject of repeated discussion, by the highest judicial tribunal in Illinois, where this corporation was created, and all the

questions presented by the record, are susceptible of ready solution in the light of both principle and authority. It will be conceded at the outset that any construction of the Statutes of Illinois, by its Supreme Court will be implicitly followed by this court in all cases arising under them. In the forcible and explicit language of Justice Swayne, in *Leffingwell* v. *Warren*, 2 Black 599: "the construc-"tion given to a statute of a State, by the highest judicial tribunal of such State, is regarded as "part "of the statute, and is as binding upon the courts "of the United States, as the text."

In behalf of the plaintiff we insist:

First. That the liability imposed by this statute is not to the corporation, but to its creditors. It became the individual personal obligation of each shareholder to each creditor, from the time when any debt was contracted by the company, and continued until the stock of such shareholder should be fully paid.

The court will observe that the charter of the company contemplated that it should commence business, not only before its capital stock of five hundred thousand dollars should be paid in, but before it was even subscribed. Express authority is conferred upon the promotors of this company, by section 3 of its charter, "to enjoy all the powers "herein conferred," wherever they shall have subscribed $100.000 of the capital stock, and shall have paid in five dollars per share as "a company "fund," and by appointing the necessary officers, and filing a certificate of organization, with the Secretary of State. After having thus authorized the Company to engage in the important and hazardous business of Life Insurance, around which

Legislatures have habitually thrown all possible safeguard and protection on payment of a cash capital of only $5000, for the purpose of providing, in some measure at least, for adequate security to those with whom the Company was thus authorized to contract. The General Assembly of Illinois provided by section 6, of the charter as follows:

§ 6 "The real and personal property of each individual shareholder shall be held liable for "any and all liabilities of the company, to the "amount of stock subscribed and held by him, and "not actually paid in. In all cases of losses exceeding the means of the corporation, each stockholder "shall be held liable to the amount of unpaid stock "held by him."

The intent of the law making power, in enacting this provision, is not difficult to discover. Its plain, evident purpose was to substitute for the cash capital of the corporation, which it was contemplated should ultimately be paid in, the individual responsibility of the several shareholders to the creditors. If it was not for the benefit of the creditors, it was absolutely unnecessary and superfluous. The company had the power to enforce payment of the capital stock without it. The Court will construe this section as having *some* purpose and effect which can only be by adopting the view we have suggested.

The Supreme Court of Illinois, in giving a construction to a similar statute, has decided in the most explicit terms that the individual liability is to the creditors and not to the corporation.

McCarthy v. *Lavasche*, 89 Ill. Rep. 270.

The Court say, p. 276: "It is urged that under the language of the third section of the charter, although a liability may be created to double the

amount of the stock, still it is to the corporation, and not to the creditors. The obvious purpose of the General Assembly was to secure the creditors of the institution. And if so, why make a provision which the creditor could not, and the directors would not, in all probability, enforce? On their refusal the creditor, if that construction is to be given, would be compelled to proceed by mandamus,

Has the law been valid to compel suits to be brought by the corporation against the shareholders, and then in all probability, after years of delay in litigation to get the money into their hands, a further delay would be liable to ensue, until a recovery could be had against the bank, and the money, realized at the end of long, obstinate and expensive litigation. Such a course could not, we think, have been intended. Such a requirement would greatly impair, if it did not render the security worthless. We must therefore conclude, that as the provision was intended to secure the creditor; it was intended that his remedy should be direct and effective, and that he might sue in his own name and at law."

The reasons given by the Court in that case are especially applicable to the one under consideration. It is unreasonable to suppose that the Legislature intended to confer all the valuable franchises contained in this charter, and to authorize the promoters of this corporation to engage in the business for which it was created, upon payment of the inconsiderable sum of $5,000 without creating a corresponding obligation on their part to the public. The language used to create this individual liability was apt and appropriate. The property of "each individual stockholder" in the company was to be liable for its debts to the amount of his unpaid stock. If

this was not the object of the section in question, it has no meaning or significance whatever. Without it the company could sue for calls, and the creditor by *mandamus* could perhaps compel the calls to be made and suits to be brought. As the Supreme Court of Illinois say, in *McCarthy* v. *Lavasche*, we are led to the conclusion that the provision was intended to secure the creditor, whose remedy was intended to be direct and effective.

The question is no longer an open one in Illinois, in view of the decision of its Supreme Court to which we have first referred, and many others in that and other States.

Fuller v. *Ledden*, 87 Ill. 310.
Aspinwall v. *Sacchi*, 57 N. Y. Rep. 331.
Paine v. *Stewart*, 33 Conn. 516.
Bank of Poughkeepsie v. *Ibbottson*, 24 Wend. 473.

In *Fuller* v. *Ledden*, 87 Ill. 312 *supra*, the Supreme Court of Illinois cite and approve the case of *Aspinwall* v. *Sacchi*, 57 N. Y. Rep. 321, when the court of appeals of New York say:

"Here by the statute, all the shareholders are made "individually liable for the debts of the company, "and the liability is the same in effect as if every "stockholder had executed a separate bond binding "himself to pay the debt upon the conditions spec-"ified in the act."

Second. The liability created by the charter being the property of the creditor, and purely statutory in its character, an action at law is the proper and appropriate remedy for its enforcement.

The Supreme Court of Illinois, in a series of well-considered cases, has sustained the jurisdiction of a

court of law in this class of cases, and has affirmed the absolute right of one creditor to sue any stockholder, in all cases where this individual statutory liability exists.

Culver v. *Third National Bank*, 64 Ill. 528.
Arenz v. *Weir*, 89 Ill. 25.
McCarthy v. *Lavasche*, 89 Ill. 270.
Fuller v. *Ledden*, 87 Ill. 310.
Wincock v. *Turpin*, 96 Ill. 135.
Butler v. *Walker*, 80 Ill. 345.

Among the earliest of this class of cases in Illinois is *Culver* v. *Third National Bank*, 64 Ill. 528, *supra*, which was very carefully considered by the Court; and the rule there established, that in all cases where this individual liability is created by special statute it may be enforced by an action at law, has been followed absolutely, without change or shadow of turning, from that time to the present. The individual liability in that case was based on the following statute:

"All the stockholders of every such corporation shall be severally and individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company prior to the time when the whole amount of its capital stock shall have been paid in, and a certificate thereof made and filed, as hereinafter required."

Suit at law was brought to enforce this liability, and the Court, p. 538, say:

"It is further objected by appellant that the liability of the stockholders under the 9th section can only be enforced in equity. This section creates a legal liability, and of course cognizable in a court of law. An implied promise arises out of this liabil-

ity. It is no objection that the stockholder may be subjected to several suits, as he can, in no event, be answerable for more than the amount of his stock."

In *McCarthy* v. *Lavasche*, 89 Ill. 270, the charter of the corporation contained this provision: "And each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer as hereinafter mentioned." The suit was by a single creditor *at law* against a single stockholder, to recover an indebtedness against the corporation. It was contended that the remedy was in equity, and not at law, and in favor of all the creditors, and against all the shareholders. The Court say, p. 277:

"Actions at law were maintained in the cases of "*Culver* v. *Third National Bank*, 64 Ill. 528, and *Cor-* "*with* v. *Culver*, 69 Ill. 502, under a statute creating "a liability of the stockholder. It was then urged "that the remedy was in equity, but we held that it "was a legal liability, and could be enforced by an ac- "tion at law. That statute did not determine, in "terms, in which forum the remedy should be sought, "but it being a legal right, the remedy was held to be "at law. It is urged that the liability should be con- "strued to be joint against all the shareholders. "To do so would, we think, do violence to the lan- "guage of the statute; the language is, 'Each "'stockholder shall be liable to double the amount "'of stock held or owned by him, for three months "'after giving notice of transfers as hereinafter "'mentioned.' This language renders the stock- "holders severally and individually liable."

In our case the *several* liabilities of the shareholder is emphasized, the language being "*each individual* stockholder" shall be liable, and not "*all* the stock-

holders," making it even stronger than the one before the Court.

A general law was enacted in Illinois in 1869, regulating the business of fire insurance companies, providing for examinations by the auditor, the formation of new companies, etc. Section 16, of which reads as follows:

"The trustees and corporators of any company organized under this act shall be severally liable for all debts or responsibilities of such company to the amount by him or them subscribed; until the whole amount of the capital stock of such company shall have been paid in and a certificate thereof recorded as hereinbefore provided."

A series of decisions under this statute have been rendered by the Supreme Court of Illinois, in every one of which suits at law have been sustained by a single creditor against a single shareholder until the question is no longer an open one in that State.

Butler v. *Walker*, 80 Ill. 345.
Arenz v. *Weir*, 89 Ill. 25.
Tibballs v. *Libby*, 87 Ill. 142.
Gulliver v. *Roelle*, 100 Ill. 141.

All these cases were suits at law, by a single creditor against a stockholder, based on the individual liability created by the provision of law above quoted, and every phase of the question was fully presented and discussed.

In *Arenz* v. *Weir*, 89 Ill. 25 *supra*, the record disclosed the fact that a receiver had been appointed of the company, but the court hold that this did not affect the right of any creditor, to sue the shareholder. The court p. 28 say:

"This insurance company having passed to a re-

ceiver, diminishes in no degree the liability of a stockholder to a creditor of the company. The creditor stands on an independent platform, above that of the receiver, having no concern with the corporation, and the stockholder is bound under the law to answer him. The stockholder is not under the control or in the power of the receiver, but holds a fund, so to speak, out of which the creditors of the company may be paid. * * * The very fact the corporation has gone into bankruptcy or into the hands of a receiver, fixes the liability of a stockholder to a creditor of the corporation."

In no one of these cases is there an intimation of doubt expressed as to the appropriate and complete jurisdiction of a court of law, or the right of any creditor to bring his action against any stockholder. The individual liability is declared to be the property of the creditor, with which neither the receiver nor assignee in bankruptcy has any concern.

It is perhaps but proper while thus considering the construction which the Supreme Court of Illinois has given to statutes of individual liability, to invite the attention of the Court to the recent case of *Low* v. *Buchanan*, 94 Ill. 76, where the remedy was held to be in equity. It arose under the general incorporation law of the State, enacted in 1872, which, however, had no reference to insurance companies, and under a provision identical in language with that which was passed upon by this Court in *Honor* v. *Henning*, 93 U. S. p. 228.

The opinion of Justice Miller in that case is quoted in the opinion of the Court in Illinois, and adopted as the proper construction to be given to section 16, of the general incorporation law of Illinois, for the reasons which were given by this Court. The statute

under consideration in both cases, reads as follows:

If the indebtedness of any company organized under this Act, shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto, shall be personally and individually liable for such excess to the creditors of the company.

This Court and the Supreme Court of Illinois, both hold that any liability under this statute arises from a breach of duty on the part of the trustees of the company.

This Court in *Harnor* v. *Henning*, p. 232, say:

"The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery. The powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock; the amount of this which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also, the number and names of the creditors; the amount of their several debts; to determine the sum to be recovered of the trustees, and apportioned among the creditors, in a manner which the trial by jury and the rigid rules of common law proceedings render impossible."

There can be no question but that, wherever the machinery and instrumentalities of a Court of Equity are necessary to make the remedy effectual, it must be sought in that tribunal. The courts will hold this to have been the intention of the law-making power, as clearly as if so expressed. But where no such necessity exists, and where a court of law *is* clothed with ample power to enforce the liability, *it* is the appropriate and proper forum. The true rule

is announced, and the distinction observed by this court in *Hornor* v. *Henning*, supra. p. 233, where the Court, after referring to the many adjudged cases from all the states, where suits at law to enforce a statutory individual liability have been sustained, use the following language:

"It is sufficient to say, that there is an obvious distinction between the liability of stockholders to the amount of their stock, which is a part of the obligation assumed when the stock is taken, and which is an exact sum, ascertainable by the number of shares owned by the stockholder, and the case of managing trustees, jointly liable for a violation of their trust to all the creditors of the coporation who may be injured thereby."

In the case under consideration there is no need of an account, nor any occasion for the employment of the forms and machinery of a Court of Equity. The amount for which defendant is liable is susceptible of proof before a jury, and the simple, direct form of proceeding at law is that which was evidently contemplated by the Legislature.

The Supreme Court of Illinois have reiterated the doctrine that, where the right is given by statute, which does not expressly provide the forum in which remedy must be sought, the right is a legal right, and the remedy is at law. But where the statute itself, as in *Low* v. *Buchanan*, 94 Ill. 76, contemplates the employment of the means and appliances of a court of equity, where accounts are to be taken and discoveries are enforced, the remedy is to be sought in chancery. The plaintiff in this case does not ask for any discovery or need any account. There are no issues raised that cannot be settled by a jury, without difficulty or embarrassment.

The Supreme Court of Illinois, in *Wincock* v. *Turpin*, 96 Ill. 135, distinguish the case of *Law* v. *Buchanan*, 94 Ill. *supra*, from the former decision of the court, and while adhering to it as the proper construction to be given to the general incorporation statute, at the same time reaffirm the cases holding that the remedy was to each creditor, and at law against each shareholder. The court say, p. 142:

"When the statute creates a liability the remedy is invariably at law, unless the statute provides for proceedings in equity." This is so plain as to be almost axiomatic; it is so well understood as to require no discussion, or citation of authorities.

The court in this case refused to enjoin suits at law by separate creditors against the stockholders, upon a statute creating an individual liability, at the suit of the receiver, on the ground that the individual liability was a provision for the benefit of the creditor, was created by statute, and with which the receiver had no concern, and that suit at law was the natural, direct and appropriate means for its enforcement.

The following may, perhaps, be regarded as the result of the decisions of Illinois, on this question:

1st. When the statute itself provides for any particular mode or forum, in which the remedy is to be pursued, it must be implicitly followed.

2nd. But in the absence of any expression of the legislative will on that subject, and unless the statute does specially provide for proceedings in equity, the remedy is invariably at law.

In this view, there can be no question but that, under the decisions of Illinois, the action at law was properly brought. While there has been no construction of this particular statute, yet in cases

almost identical with it, the action at law has been invariably sustained, until it can be regarded no longer an open question. The right of the individual creditor to sue the shareholder we insist has become a rule of construction, as binding upon the courts of the United States as if that remedy were specifically pointed out and in the statute itself.

The construction thus given to statutes of individual liability, is the same as that adopted by the Courts of last resort in nearly all the States where the question has arisen.

Ingalls v. *Cole*, 47 Maine Rep. 530.
Paine v. *Stewart*, 33 Conn. 516.
Bossett v. *St. Albans*, 47 Vt. 313.
Patterson v. *Arnold*, 45 Pa. State 410.
Adkins v. *Thornton*, 19 Ga. 325.
Corning v. *McCullough*, 1 Comstock, 47.
Aspinwall v. *Sacchi*, 57 New York, 335.
Bank of Poughkeepsie v. *Ibbotson*, 24 Wendell, 473.

This citation of authorities might be extended indefinitely: all are conclusive as to the right and the remedy. We cannot however, omit calling the attention of the court to one of the earliest and best considered cases where the opinion was given by the late Justice Nelson in *Bank* v. *Ibbotson*, 24 Wend. 473, cited above, and which in this, as in other cases, leaves little to be said on the subject by those who follow him.

In the opinion the Court say: "I can see no valid objection to the enforcement of it in a court of law. There can be no greater difficulty in establishing or resisting the demand, than in a court of equity, as the ground and extent of the liability are distinctly

given. It is true the stockholder may be subjected to several suits, but he can be charged only to the extent of his stock. Beyond this, his defense is as perfect at law as in equity.

On payment of debts, or a personal charge in respect to them to this amount, there is an end of further liability. It was made a question in the several cases above referred to, whether the suit in equity could be maintained, on the ground of a remedy at law; the answer confirms the view we have taken; it is, that the creditor is entitled to contribution from all the stockholders, if requisite to the satisfaction of his debt, and that numerous suits might become necessary. To avoid this he may resort to that Court. The creditors, if more than one, may also, it seems, if they apprehend a deficiency in the fund, enforce in equity a *pro rata* distribution. 8 Cowen, 392.

"But this must be at their election. Any difficulty that may exist on the part of the stockholder, in protecting himself beyond the statute liability, has never been suggested as a ground of proceedings in equity. Indeed, it is clear that as to him, the defense is as perfect, if not as simple, in the one court as in the other."

It is a matter of business experience that the individual liability of shareholders can be more readily enforced by suits at law than in equity. In this, as in nearly all the great corporations, the shareholders are scattered in many different States, and subject to as many distinct jurisdictions.

It is simply impossible to make them all parties to a suit in equity, without their voluntary appearance. The creditor who sues in equity in Illinois, cannot bind the shareholder who lives in New York

or Georgia by any decree without his consent. Nor will any one creditor venture to undertake the onerous responsibility of bringing a suit to settle all the affairs of the corporation and engage in a litigation which may last for years, at heavy costs, to enforce the individual liability of all the shareholders, for all the creditors. The simple and appropriate remedy is by direct suit at law by the creditor against the stockholder.

We respectfully insist that this is the rule best sustained by reason and authority, in Illinois and elsewhere, and that the Court below erred in sustaining the demurrer and dismissing the suit.

E. A. OTIS,

Attorney for Plaintiff in error.

SUPREME COURT U.S.
FILED
JAN 10 1882
JAMES H. McKENNEY,

IN THE SUPREME COURT OF THE UNITED STATES.

No. 207.

OCTOBER TERM, A. D. 1881.

NANNIE H. BLAIR ET AL.,
Plaintiffs in Error,
v.
FRANKLIN D. GRAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement of the Case.

As said in the brief for the plaintiffs in error, this record presents the single question, whether the defendant, admitting him to have been a stockholder in the Republic Life Insurance Company, is liable, under its charter, to a suit at law by one of its creditors, who became such on account of a death loss.

This question arises on section 6 of the charter, set out in the brief for plaintiffs in error, p. 4, which is as follows:

"The real and personal property of each individ-
"ual stockholder shall be held liable for any and
"all liabilities of the company, to the amount of stock
"subscribed and held by him and not actually paid
"in. In all cases of losses exceeding the means of
"the corporation, each stockholder shall be held
"liable to the amount of unpaid stock held by him."

Points.

I.

THE ACTION GIVEN BY THIS SECTION IS IN FAVOR OF THE COMPANY, AND NOT OF THE CREDITORS.

The object of the section, as is manifest from the charter, which is set out in the brief for the plaintiffs in error, ~~that~~ the company ~~was formed~~ was to realize to do business before the subscribed capital was wholly paid in.

Section 6, read in connection with section 5, and with the rest of the charter, had for its object to permit the company to sell its stock on a credit basis, offering as an inducement that the unpaid portion of the subscription or installments due on the stock should not be called in until the exigencies of the company required it.

In this view, the unpaid part of the subscription outstanding was a corporate asset, the collection of which by the charter was postponed until the events contemplated in section 6 should occur.

Hornor v. *Henning*, 93 U. S., 228.
King v. *Assurance Co.*, 11 Exch., 443.
Banet v. *R'y Co.*, 13 Ill., 504.

One of these events was that the stockholder would not be held liable until losses had occurred exceeding the means of the corporation.

And it is here to be observed that no suit by the corporation, or even by a creditor, if the section gave a right of action to him, could be maintained until the losses did exceed the means of the corporation;

and there is no averment in the declaration that such was the case at the time this suit was brought.

This case falls within the distinction that where the liability in the charter is a capital stock liability, the remedy is by necessary implication, confined to the corporation with whom the contract was made, subject to the condition that the calling in of the credit will not be made until the financial condition of the company shall actually require it; and in this respect the case differs from those where a liability over and above the capital stock liability is created by the charter, and where in such a case the implication is that the liability is reserved to the creditors, either severally or jointly, as the case may be.

The present case does not fall within the latter distinction; and none of the Illinois cases cited by counsel for the plaintiffs in error, are in conflict with this distinction, which is one well recognized by other courts and also by this court in its numerous decisions upon the question of stockholders' liability when reserved to the company.

The liability of stockholders to creditors for the debts of the corporation is contrary to the general theory of the law. It is, in short, the liability of one person for the debt of another. It is created only by statute and must be construed strictly like the obligation of a surety.

Mr. Chief Justice Shaw, in *Gray* vs. *Coffin*, 9 Cushing, 199, speaking of this liability, says:

"It is to be construed strictly, and not extended "beyond the limits to which it is plainly carried by "such provisions of statute."

In *Baker* v. *Backus*, 32 Ills, 99, MR. CHIEF JUSTICE BREESE, delivering the opinion of the Court, says:

"The stockholders * * can be responsible only "in the mode prescribed in the act in which they "become associated as a corporation. They are not "individually liable excepting under the circum- "stances, and for a time specified in the act of incor- "poration."

And it has been held by this Court, that where a shareholder has thus been made liable only in case of a deficiency, it must be shown that the other assets have all been exhausted.

Horner v. *Henning*, 93 U. S. 228.
King v. *Assurance Co.* 11 Exch. 443.

In the present case the plaintiff's claim is for a death loss, and in respect of such losses, as already said, no liability can arise excepting in those cases where the losses exceed the means of the corporation.

In this connection, attention is called to the following cases:

Bannet v. *Railroad Co.* 13 Ills. 500.
Lamar Ins. Co. v. *Moore*, 84 Ills. 574.

Among the cases in this Court to which reference is made, are the following:

Kennedy v. *Gibson*, 8 Wallace, 498.
Bank v. *Kennedy*, 17 Wallace, 19.
Pollard v. *Bailey*, 20 Wallace, 520.
Terry v. *Tubman*, 92 U. S. 156.
Angell & Ames Corp. Sec. 605.

All of which is respectfully submitted.

FRANCIS H. KALES,
For Defendant in Error.

1 In the supreme court of the State of California.

B. F. LANGFORD, PLAINTIFF AND RESPONDENT,
vs.
BERNARD POPPE, DEFENDANT AND APPELLANT. } No. 6608.

TRANSCRIPT ON APPEAL.

Terry & McKinne, attorneys for plaintiff and respondent.
J. H. Budd, attorney for defendant and appellant.

(Indorsed:) Filed May 10th, 1879. D. B. Woolf, clerk, by John P. Poole, deputy clerk.

2 In the district court of the 5th judicial district of the State of California, in and for the county of San Joaquin.

JOHN H. VALENTINE, PLAINTIFF,
vs.
BERNARD POPPE, DEFENDANT.

Complaint.

The above-named plaintiff complains against the said defendant, and for cause thereof shows to the hon. court as follows, to wit:

3 I. That on the 1st day of February, 1874, the said plaintiff was the owner in fee and seized and possessed and entitled to the possession of that certain tract of land situate in the county of San Joaquin, State of California, described as the southwest quarter of section eleven (11), township 4 north, range 8 east, Mt. Diablo meridian, containing 160 acres.

II. That while plaintiff was such owner, and so seized and possessed of said land and premises, the said defendant, on the said day and year, wrongfully and unlawfully, and without right or title, did enter into and upon said premises and oust and eject plaintiff therefrom, and ever since has wrongfully and unlawfully withheld, and still withholds, the possession of said premises from plaintiff to his damage in the sum of $1,000.

III. That the value of the rents, use, and occupation of said premises is the sum of $5 per acre per year, aggregating the sum of $800 per year.

4 Wherefore plaintiff prays judgment against said defendant for the restitution of said premises and for the sum of $1,800 damages, and for use and occupation thereof and for costs of suit.

TERRY & MCKINNE AND
GEO. CADWALADER,
Attorneys for Plaintiff.

(Endorsed:) Filed July 11th, 1875. George Tilghman, clerk, by A. F. Weber, deputy clerk.

[Title of court and cause.]

Answer.

The above-named defendant, answering plaintiff's complaint, denies each and every allegation thereof.

Further answering, defendant alleges that at the time and times in said complaint mentioned, and during all of said time, defendant was, and long before had been, and now is, seized in fee, the owner of, possessed, and entitled to the possession of the land and premises in plaintiff's complaint mentioned and described, and of each and every part thereof.

5 Wherefore defendant prays judgment for his costs of suit.

J. H. BUDD,
Attorney for Defendant.

Received a copy this 22d day of July, 1875.

TERRY & McKINNE,
Attorneys for Plaintiff.

(Endorsed:) Filed July 22d, 1875. George Tilghman, clerk, by A. F. Weber, deputy clerk.

[Title of court and cause.]

Order substituting B. F. Langford as plaintiff..

MONDAY, *Sept. 2d*, 1878.

This cause came on regularly for trial this day, the parties appearing by counsel; Messrs. Terry & McKinne appearing for plaintiff, and J. H. Budd & Sons for defendant.

On motion of counsel for plaintiff, the defendant making no objection, it was ordered that B. F. Langford be substituted as plaintiff in this action in place of J. J. Valentine.

6 In the district court, fifth judicial district, State of California, county of San Joaquin.

B. F. LANGFORD, PLAINTIFF,
vs.
B. POPPE, DEFENDANT.

Findings.

This cause was tried by the court without a jury, and after hearing the evidence and argument of counsel, the court finds the following facts:

First. That on the 1st day of February, 1874, and at the time of the commencement of this action, J. J. Valentine (the original plaintiff), was the owner of and entitled to the possession of all the land and premises described in the complaint, except a portion thereof containing fifty and $\frac{4}{100}$ acres on the west side thereof, described as follows to wit: Beginning at the northwest corner of the quarter section described in the complaint, and running thence east 16.58 chains to a large oak tree; thence south, along a fence 30.95 chains to

7 the Mokelumne River; thence west, following the meandering of said river to the west line of said quarter section; thence north along said west line to the point of beginning; and was on said 1st day of February, 1874, and for a long time theretofore had been in the actual possession thereof.

Second. That on the 1st of February, 1874, the defendant, without

the consent, and against the will of said Valentine, entered into and upon the land so owned and possessed by the said Valentine, and has continued to hold and occupy said land from thence hitherto.

Third. That the value of the use and occupation of said land so withheld by the defendant during the time he has so occupied and withheld the same is $2,800.

Fourth. That after the commencement of this action and before the trial thereof, said Valentine sold and conveyed said land and assigned all his interest in said action and all sums of money that might be recovered thereon, to B. F. Langford, who was, by order of the court, substituted as plaintiff in said action, in lieu of the said Valentine,
8 and said Langford is and was at the trial of said cause the owner of and entitled to the possession of said land, and to the value of the use and occupation thereof.

And as conclusion of law from the foregoing facts the court finds that plaintiff B. F. Langford have judgment against the defendant B. Poppe, the possession of the quarter section of land described in the complaint (except the fifty and acres $\frac{4}{10}$ particularly described in the first finding) and for two thousand eight hundred dollars, the value of the use and occupation thereof, and the cost of this action.

S. A. BOOKER,
District Judge.

(Endorsed:) Filed September 6, 1878. H. W. Weaver, clerk, by J. L. Phelps, deputy.

[Title of court and cause.]

Judgment.

This cause came on regularly for trial at the August term, A. D. 1878, of this court, Messrs. Terry & McKinne appearing as counsel for the plaintiff, and J. H. Budd, esq., for the defendant.
9 A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried by the court siting without a jury.

Whereupon witnesses, on the part of plaintiff and defendant, were duly sworn and examined, and certain documentary evidence introduced; and the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court delivers its finding and decision in writing (said findings being filed this 6th day of September, A. D. 1878), and orders that judgment be entered herein in favor of B. F. Langford, the plaintiff, in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed that B. F. Langford, the plaintiff herein, do have and recover from the defendant, B. Poppe, the possession of the following described real-estate, situate in San Joaquin County, State of California, to wit, the southwest quarter of section eleven (11) in township four (4) north, range eight (8) east Mount Diablo meridian, containing 160 acres, except a portion thereof containing fifty and $\frac{4}{10}$ acres on the west side thereof, described as follows, to wit:
10 Beginning at the northwest corner of the quarter section aforesaid, and running thence east 16.58 chains to a large oak tree, thence south along a fence 30.95 chains to the Mokelumne River; thence west, following the meanderings of said river to the west line of said

quarter section; thence north along said west line to the point of beginning.

And it is further ordered, adjudged, and decreed that said plaintiff, B. F. Langford, do have and recover of and from said defendant, B. Poppe, the sum of two thousand eight hundred dollars, for the use and occupation of the land recovered in this action, and his costs of suit herein expended,, taxed at $144.45.

Judgment rendered Sept. 6th, 1878.

[Title of court and cause.]

Notice of motion for a new trial.

You will take notice that the defendant in this action intends to move for a new trial therein, and on the following grounds, viz:

1st. For insufficiency of the evidence to justify the findings and judgment of the court.

2d. For that said findings and judgment are against law.

11 3d. For errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made on a bill of exceptions.

Truly yours,

J. H. BUDD,
Attorney for Defendant.

To B. F. Langford, esq., who has been substituted by the court as plaintiff in place of J. J. Valentine, the original plaintiff in the action, and to Messrs. Terry & McKinne, attorneys for plaintiff.

Received a copy of the within this 14th day of September, A. D. 1878.

TERRY & McKINNE,
Plaintiff's Attorneys.

(Endorsed:) Filed Sept. 14th, 1878. H. W. Weaver, clerk, by C. T. Elliott, deputy.

[Title of court and cause.]

Motion for a new trial.

The defendant moves the court for a new trial in the action, and on the following grounds, viz:

12 1st. For insufficiency of the evide'ce to justify the findings and judgment of the court.

2d. For that said findings and judgment are against law.

3d. For errors in law occurring at the trial and excepted to by the defendant.

J. H. BUDD,
Attorney for Defendant.

The following is the proposed bill of exceptions of defendant on said motion:

Bill of exceptions.

Be it remembered that this action came on for trial by the court without a jury at the August term, A. D. 1878, of said court.

On the trial of the action the following occurred:

B. F. Langford, on the motion of plaintiff's attorneys, was substituted as plaintiff in the action in the place of J. J. Valentine, the original plaintiff in the action.

Plaintiff offered in evidence a patent from the State of California to P. A. Athearn, purporting to convey to him the land sued for, and other lands, as a part of the 500,000-acre grant made by Congress to the
13 State of California. Said patent was dated January 8th, A. D. 1862, and was in due form of law.

Defendant objected on the ground that it was not shown that the land embraced in said patent had ever been granted by the Government of the United States to the State of California, and it was not proven that said land had ever been listed by the Secretary of the Interior to said State.

The court overruled the objection, and the defendant excepted.

The patent was then read in evidence.

Plaintiff then read in evidence a mortgage executed by P. A. Athearn in favor of T. R. Anthony, dated June 3d, 1862, and duly recorded, by which said Athearn mortgaged to said Anthony the land described in the complaint as security for the payment of $2,188 due on a promissory note given by said Athearn to said Anthony.

Plaintiff then introduced in evidence the records of the probate court of San Joaquin County in the matter of the estate of P. A. Athearn, deceased, and showing the appointment of William Athearn as the administrator of the estate of P. A. Athearn. The appointment was made in April, 1867.

Plaintiff then put in evidence the judgment-roll in the case of
14 M. J. Dooley vs. Wm. Athearn, administrator of the estate of P. A. Athearn et al. in the district court of San Joaquin County, commenced June 3d, 1867, by which said Dooley as assignee of the mortgage given by P. A. Athearn to T. R. Anthony, procured a decree for the sale of the mortgaged property (including the land in controversy) to satisfy said mortgage, said decree being entered Aug. 16th, 1867.

Plaintiff also put in evidence—

1st. The copy of the decree and order of sale issued in said case, and the return of the sheriff thereon, showing that said land had been sold under said decree and order of sale and purchased at said sale by J. J. Valentine.

2d. A certificate of sale by said sheriff to J. J. Valentine.

3. A deed from said sheriff to said Valentine in due form of law, containing all necessary recitals, executed under and pursuant to said decree and sale, and purporting to convey to said Valentine all of said mortgaged premises, including the land in controversy in this action.

4th. A deed from J. J. Valentine to B. F. Langford, executed in 1878, conveying to said Langford all the right, title, and interest of said Valentine in and to the land sued for.

15 5th. An assignment from said Valentine to said Langford, executed in 1878, assigning to said Langford all claim of said Valentine against the defendant for the rents and profits of said land *and* in this action.

The following witnesses were sworn and examined on behalf of plaintiff, and testified:

J. F. McDOWELL called for plaintiff:

I reside within a half mile of the land in controversy, on an adjoining quarter section; have resided there since April, 1853. Mr. Poppe was then in possession of the west portion of the land in controversy, and Mr. Vance was cultivating the other portion of it. Mr. Athearn succeeded Mr. Vance—P. A. Athearn—he is since dead. I have measured the portion of the land occupied by Mr. Poppe and made it 47½ acres. Mr. Vance was in possession of all the balance of the quarter section when I first knew it. He cultivated it, and he and Athearn have been in possession since.—I think Vance left in 1856, and Mr. Athearn and his family continued to up till four or five years ago. Athearn had this land enclosed from the year 1856 with a substantial fence.

After Mr. Athearn's death I think Mr. Valentine had it. Will-
16 iam Athearn attended to it for Mr. Valentine. I learned it from William Athearn letting Willard Hansel have the place a year or two, and through S. L. Magee, who cut some hay there. I think a survey was made last Saturday of the land which was occupied by Mr. Poppe previous to 1860. I pointed out to the surveyor last Saturday the lines of Poppe's old enclosure. Mr. Reid was the surveyor. The land I pointed out was that of which Poppe was in possession in 1853. In pointing it out, I made a little mistake. When I measured the land Mr. Poppe had a barn right on the line. Since then he has added to to the barn an 18-foot shed, and not thinking of that I stuck the stake for Mr. Reid at the corner of the shed; so the land surveyed by Mr. Reid is a little more than Poppe had when the first survey was made; more by the width of the shed.

I assisted Mr. Drew to survey the land occupied by Poppe in 1862.

The field-notes of Drew's survey were then read to witness, as follows:

"Beginning at the western line of said section at the half-mile stake on the northwest corner of said half section; that is, the south half of section eleven, running thence east on the north line of the south half of the section, 69½ rods; thence south 128 rods, to the river; thence west
17 69½ rods, to the west line of said section; thence north along the west line of said section, 128 rods to the place of beginning."

That is the survey. The line running north is between me and this land.

This is the same land pointed out by me to Mr. Reid, and the fence running south to the river is within 2½ feet of where it was in 1853. I think it is about 2½ feet east. The land described in that survey is that of which Poppe was in possession before 1860. The south boundary was the Mokelumne River. The fence running north and south, on the east line of the land occupied by Poppe as surveyed by Drew, has been kept up since 1853, and has always been in good condition sufficient to turn stock.

Poppe took possession of the land outside of his enclosure—outside of the tract marked green on the diagram—in the winter of 1873-'4; I think in January or February, 1874.

I am as well acquainted with this land as with my own. Its rental value since February, 1874, has been and is 8 or 10 dollars per acre per

year. The quantity of the land outside of Poppe's old enclosure which I say is worth 8 or 10 dollars per year per acre is from 70 to 85 acres. There are from 5 to 7 acres of that quarter section south of the river.
18 There are from 70 to 85 acres north of the river and outside of Mr. Reid's survey, which I estimate to be worth 8 or 10 dollars per acre rent.

S. L. MAGEE, called for plaintiff, testified:

I know the land in controversy; have known it since 1852; am son-in-law of P. A. Athearn. From the time I first knew the land until 1874 Mr. Athearn and his representatives were in possession of the whole quarter section outside of Poppe's enclosure.

After Athearn's death, which occurred in 1867, his heirs were in possession. I was a party to the suit brought by Dooley to foreclose a mortgage on this land; my wife was an heir of Athearn.

After the sale under the decree in that suit, Wm. Athearn was in possession.

Witness was asked by attorney for plaintiff: Do you know from William Athearn, while he was in possession, for whom he was holding the land—whether for himself or some other person?

(Defendant objected to the question, the court overruled the objection, and defendant excepted.)

The witness answered: "He was holding for Mr. Valentine, the purchaser. I held it myself for Valentine five or six years. I held
19 it up to the time that Hansel took it; he had it two years. I cut hay on it one year, put up the fences, and kept them up. My agreement with Mr. Valentine was verbal; I was to keep possession and keep up the fences, and keep other fences from being built, which I did. Poppe took possession of all the land north of the river about four years ago. I took possession for Valentine about two years after he purchased the land. I paid no rent; he gave me the use of the land for keeping up the fences and keeping other people off of it."

JOHN C. REID sworn for plaintiff:

I made a survey last week of a piece of land pointed out by McDowell. This is a diagram of it (Exhibit 3). This is the corner between sections 10 and 11 in 4 north, 8 east. It was pointed out as the corner.

There is a post standing there near the corner of two fences; this line runs to a large oak tree, five feet in diameter and blazed on the west and south sides; old blazes—been there a long time. It has undoubtedly been a corner. From that tree running south there is a fence which does not quite reach the river, probably 3 or 4 rods from the river; then there is a fence running from there up, probably half way, till it strikes the bluff and makes the bluff the fence for the rest
20 of the way; that point is on the bank of the river and is the section line. The quantity of land is 50 acres and $\frac{4}{10}$. The diagram put in evidence in connection with Reid's testimony, the land surveyed by him is colored green on the diagram.

Plaintiff offered and read in evidence the complaint, answer, findings, and judgment of this court, notice of appeal and undertaking on appeal to the supreme court, remittitur of supreme court, and judgment of dismissal of the action in an action commenced in 1864 in this court by said B. Poppe against said P. A. Athearn for the possession of the land suedfor in this action.

The complaint in that action was filed in 1864 in due form and con-

tained all the necessary allegations to entitle said plaintiff in that action, Poppe, to a judgment for the possession of the said land described in the complaint in that action, and which is the same land sued for in this action.

The answer was in due form and denied all the allegations in the complaint. The judgment in that action was rendered in 1866, and adjudged to plaintiff the possession of the land sued for therein and described in the complaint therein.

The notice of appeal and undertaking on appeal were executed
21 to and did stay the execution of said judgment during the pendency of the appeal.

The remittitur in that action was filed in this court in November, 1872, and contained the judgment of the supreme court on said appeal, reversing said judgment of said district court and ordering a new trial in the action.

Said judgment of dismissal was entered in August, 1874.

Plaintiff rested.

Defendant moved the court for a judgment of nonsuit, on the ground that plaintiff had not proven that he was the owner of or entitled to the possession of the land sued for, or any of it.

The court denied the motion, and defendant excepted.

Defendant offered and read in evidence a patent from the United States, dated in November, 1863, purporting to grant and convey to him the land sued for in this action.

Said patent was in due form, and was in the usual form of patents issued by the United States to pre-emptors who had pre-empted and purchased public land of the United States under the pre-emption laws of the United States.

22 The following facts were then proven on the part of the defendant, viz:

First: That said land sued for was, in and during the year 1851, agricultural public land of the United States, subject to pre-emption under the laws of the United States, and that it does not contain any known mines or salines, and it has never been within the limits of any town or village.

Second. That defendant settled on said land in August, 1851, in person, and built a dwelling-house on said land, in which he resided with his family, and improved and cultivated said land, and that such settlement, residence, and improvement were made by defendant in good faith, with the intention of pre-empting and purchasing said land as a pre-emptor under the pre-emption laws of the United States.

Third. That at the time of said settlement, defendant was a citizen of the United States, over the age of 21 years, and was the head of a family, and that he then possessed and has ever since possessed
23 all the qualifications requisite to pre-empt and purchase said land under the pre-emption laws of the United States.

Fourth. That the township in which said land was and is situate, was surveyed into sections and quarter sections by the United States surveyor for California, in August, A. D. 1855; and that immediately after such survey and in 1855, defendant commenced building, and built a large and commodious dwelling-house on said land, in which he has resided with his family ever since, and that he has every year since 1851, cultivated and improved fifty acres of said land, claiming said entire tract of land, under the pre-emption laws of the United States

and under his purchase thereof as a pre-emptor under the pre-emption laws of the United States.

Fifth. That on the 10th day of April, A. D. 1855, defendant filed in the office of the register of the United States land office of the Marysville land district, within which district said land then was, his declaratory statement, signed by him, of his intention to pre-empt said land under the laws of the United States. Said statement alleged settlement on the land in August, 1851, and contained the usual and all the
24 requisite statements required to be made in a declaratory statement filed by a pre-emptor under the pre-emption laws of the United States. That the township plat of said township was on file in the office of the register of said U. S. land office at the time of the filing of said declaratory statement.

Sixth. That in 1862 defendant made the requisite proof as a pre-emptor, and took and filed the requisite oath as a pre-emptor of said land before and with the register and receiver of the U. S. land office, stockton land district, within which land district said land then was, and, by reason of such proof and oath, was permitted to and did pay as a pre-emptor for said land to the receiver of said office, and under and by virtue of said proof, oath, and payment he received from the United States the patent for said land read by him in evidence in this action.

B. POPPE, sworn and examined as a witness in this action, testified as follows:

I settled on the land sued for in 1851 with my family, and built a dwelling-house on it. The house was small, and I built another house, as I thought, on this land and nearer the river for the convenience of water. My family lived part of the time in one house and part of
25 the time in the other. Some of the family occupied the first house all of the time. In 1855, when the section lines were run, I found this last house was not on this land, but was a short distance off the line on an adjorning section. As soon as the lines were run I moved all of my family in the first house, and I built, in 1855, a large house near the first house, and in this I have lived with my family ever since it was built.

In January, 1874, I found I could get peaceable possession of all the land north of the river, and I did so, and I have had the possession of it ever since.

I have been in the possession of, and have cultivated, about 50 acres of the land sued for lying north of the river ever since my settlement on it, in August, 1851.

Defendant rested.

The following are the errors in law occurring at the trial and excepted to by the defendant, on which he will rely in his said motion, viz:

The court erred:

First. In overruling defendant's objection to the patent offered in evidence by plaintiff.

26 Second. In overruling defendant's objection to the question asked by plaintiff of the witness McDowell as to declarations made by the sons of P. A. Athearn as to the person for whom he held possession of the land.

Third. In overruling the objections of defendant to the question asked

the witness Magee by plaintiff as to the declarations of Miller as to the person for whom he held possession of the land.

Fourth. In denying defendant's motion for a nonsuit.

The defendant in his said motion will rely on the following as the particulars in which the evidence is insufficient to justify the findings and judgment of the court, viz:

First. The evidence fails to show that plaintiff is or ever was the owner of the land sued for, or of any of it.

Second. The evidence fails to show that plaintiff or his grantor
27 Valentine is, or ever was, entitled to the possession of the land sued for, or to any of it, and fails to show that plaintiff or his said grantor is, or ever was, entitled to the rents, issues, and profits of said land or of any part thereof.

Third. The evidence shows that the only title or claim of title of the plaintiff to the land sued for is under the patent from the State of California, read in evidence, and the evidence fails to show that said State ever had any title to said land or to any of it.

Fourth. The evidence shows that said land was agricultural public land of the United States, and that while such, the defendant settled thereon as a pre-emptor under the pre-emption laws of the United States in 1851; and that defendant as such pre-emptor resided on and improved and cultivated said land ever since 1851; that he has fully complied with the requirements of the pre-emption laws of the United States, and has proved up as such pre-emptor his right to said land under said settlement, residence, and improvement, and paid for said land and received a patent from the United States granting and conveying to him said land by reason of his said pre-emption right thereto,
28 and the evidence shows that his right as such pre-emptor to said land is prior to any right or claim of title of P. A. Athearn (under whose title plaintiff claims) in or to said land.

Fifth. The evidence fails to show any right or title of said Athearn to said land prior to defendant's said pre-emption right thereto.

Sixth. The evidence shows a right of defendant as a pre-emptor to said land prior to any right thereto of said Athearn (under whose title plaintiff's only claim of title to said land is) and the evidence shows that defendant kept good and perfected his said pre-emption right to said land, and by reason thereof received his said patent therefor from the United States.

Seventh. The evidence fails to show that plaintiff ever acquired any title to or right of possession of said land or any of it under or by tue of the statute of limitations of the State of California.

Eighth. The evidence fails to show that defendant ever withheld from plaintiff or his grantor any of said lands lying northerly
29 of the Mokelumne River. And the evidence fails to show that plaintiff was ever the owner or entitled to the possession of any of the land sued for which lies north of said river, either by the possession of himself and grantors, by the statute of limitations of this State or otherwise.

Ninth. The evidence shows that defendant was the owner and entitled to the possession of all the land sued for, and while he was such owner and entitled to the possession of said land he acquired peaceably the possession of all of said land lying north of the Mokelumne River, and the evidence fails to show that his right to such possession was

ever barred or taken away by the statute of limitations of the State of California.

J. H. BUDD,
Attorney for Defendant.

[Title of court and cause.]

The above and foregoing bill of exceptions having been duly presented to me for settlement, I certify that I have settled the same and that the same is correct.

Dated March 17th, 1879.

S. A. BOOKER,
District Judge.

30 The motion for a new trial in the above cause was this day submitted, and the same was denied, and it is ordered that proceedings under the judgment in said cause be stayed for 20 days from date.

S. A. BOOKER,
District Judge.

MARCH 17, 1879.

(Endorsed:) Filed March 17, 1879. H. W. Weaver, clerk, by J. L. Phelps, deputy.

[Title of court and cause.]

Notice of appeal.

You will take notice that the defendant in this action hereby appeals to the supreme court of the State of California from the judgment therein made and entered in the said district court on the sixth day of September, A. D. 1878, in favor of said plaintiff, B. F. Langford, and against said defendant, and from the whole thereof.

You will also take notice that said defendant also appeals to
31 said supreme court from the order made and entered in this action in said district court on the seventeenth day of March, A. D. 1879, denying said defendant's motion for a new trial in the action.

J. H. BUDD,
Attorney for Defendant B. Poppe.

To Messrs. TERRY & MCKINNE,
Attorneys for Plaintiff.

(Endorsed:) Filed March 31st, A. D. 1879. H. W. Weaver, clerk, by C. T. Elliott, deputy.

[Title of court and cause.]

Stipulation.

We hereby certify that the foregoing is a full, true, and correct transcript of the complaint, answer, order substituting Langford as plaintiff, findings of court, judgment, notice of motion for new trial, motion for new trial and statement on the motion, order denying motion for a new trial, and notice of appeal to the supreme court, with the proper

endorsements on each, in the above-entitled cause, and that an
32 undertaking on appeal in due form has been properly filed.
Dated April 30th, A. D. 1879.

J. H. BUDD,
Attorney for Defendant and Appellant.
TERRY & McKINNE,
Attorneys for Plaintiff and Respondents.

33 *Judgment.*

In the supreme court of the State of California. No. 6608. Department one. October 1st, 1880.

B. F. LANGFORD, PLAINTIFF AND RESPONDENT,
vs.
BERNARD POPPE, DEFENDANT AND APPELLANT.

On appeal from the district court of the 5th judicial district in and for the county of San Joaquin.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by McKinstry, J.; Ross, J., McKee, J., concurring.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment and order of the district court of the 5th judicial district, in and for the county of San Joaquin, in the above-entitled cause be, and the same is hereby, affirmed with costs.

34 LANGFORD *vs.* POPPE. No. 6608. Department No. 1. Filed October 1, 1880.

The only question to be considered is whether the plaintiff can recover upon a title acquired through or by means of the statute of limitations. It is not necessary to determine whether the effect of possession under the statute is to transfer to the actual occupant the title of one previously the real owner, or to create a new title in the possessor—the title of the previous owner and his right to assert it becoming extinguished at the expiration of the period of adverse possession. It was said by Sawyer, C. J., in Cannon vs. Stockmon, 36 Cal., 540: "When a party has been in adverse possession for five years, he thereby acquires a title, and if, after he has thus become vested with a right, he is ousted, even by the party holding the paper title, he can recover on his title acquired by his adverse possession." In the same case the learned chief justice quoted the language of the supreme court of Maine, in Winthrop vs. Benson, 31 Me., 834, where it was said: "An open, notorious, exclusive adverse possession of twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance." And the Supreme Court of the United States has declared: "The lapse of time limited by such statute not only bars the remedy, but extinguishes the right, and vests a perfect title in the adverse holder." (Leffingwell vs. Warren, 2 Black, 605.

See also the numerous cases cited in Cannon vs. Stockmon, and in Arrington vs. Liscom, 34 Cal., 381.)

Even if the adjudications left the matter in doubt, section 1007 of the civil code provides: "Occupancy for the period prescibed by the code of civil procedure as sufficient to bar an action for the recovery of property, confers a title thereto," etc.

The case shows that Athearn had actual and exclusive possession, claiming title of all the land in controversy, except a strip of six or seven acres lying south of the river, from some time in the year of 1856 until his death in 1867. January 8, 1862, the State of California issued a patent for the land to Athearn purporting to convey it as a part of the 500,000-acres grant to the State by act of Congress. The case also shows that after the death of Athearn the premises remained in the actual, and, as against all the world except the heirs of decedent, adverse possession of the administrator of the estate of Athearn, until the execution of a sheriff's deed thereof (based upon judgment for mortgage foreclosure and execution duly rendered and issued against the said administrator in his capacity as such) to one Valentine, by whom it was held in like possession until the entry of defendant in January, 1874; and that the land was afterwards conveyed by Valentine to plaintiff.

Defendant claims title and the right of possession under a patent from the United States, issued to him in November, 1863.

In 1864 defendant commenced an action of ejectment against Athearn to recover possession of the lands here in controversy, and, after certain proceedings therein had, in 1866, a judgment was rendered in the district court in his favor for the recovery of the premises. Athearn appealed from the judgment and gave an undertaking to stay execution during the pendency of the appeal. The supreme court reversed the judgment and ordered a new trial, and the remittitur was filed in the district court in November, 1872. In August, 1874, the said action of ejectment was dismissed.

It is now claimed by appellant that the remaining of the period prescribed by the statute of limitations was interrupted during the pendency of the action of ejectment wherein he was plaintiff, and that plaintiff and his predecessors, therefore, have never had five years continuous adverse possession since defendant received his patent, in November, 1863.

The acquisition of a right by adverse possession depends upon adverse holding of the person claiming the right, and not simply upon the acts of one claiming a paramount title, who has been in a position to assert his title during the statutory period. The dismissal of defendant's action of ejectment terminated his right to claim anything by the virtue of that action; and the facts that plaintiff and his predecessors contested the action and refused to surrender the possession; only tend to prove that their possession was adverse.

From the date of the patent to Athearn in 1862, he, and his successors, held under color of title. Plaintiff, therefore, by virtue of his actual adverse possession of the rest of the tract sued for under the patent was entitled to recover the strip of land included within the calls of the patent south of river—which was in the actual possession of no one until the entry by defendant.

Judgment and order affirmed.

McKINSTRY, *J.*

We concur:

ROSS, *J.*
McKEE, *J.*

35 In the supreme court of the State of California.

B. F. LANGFORD, PLAINTIFF AND RESPONDENT,
vs.
B. POPPE, DEFENDANT AND APPELLANT. } No. 6608.

Petition of appellant for hearing in banc.

J. H. Budd, attorney for appellant.
Greathouse & Blanding, of counsel.

(Indorsed:) Filed Oct. 20th, 1880. Frank W. Gross, clerk, by C. Harlan, deputy.

36 In the supreme court of the State of California.

B. F. LANGFORD, PLAINTIFF AND RESPONDENT,
vs.
B. POPPE, DEFENDANT AND APPELLANT.

Petition of appellant for a hearing of the case by the court in banc.

To the hon. the supreme court of the State of California:

The appellant most respectfully petitions that an order be made for a hearing of this case by the court in banc.

The following important questions of law are involved in this case, viz:

1st. Does the statute of limitations of this State confer a title on which an action can be maintained for the possession of land
37 against the owner of the land who has acquired his title thereto under a patent from the United States, and who has acquired possession of the land peaceably and without fraud?

2d. Does the pendency of an action by the owner of the land preserve his right of entry thereon so that he may lawfully take possession of the same during the pendency of the action, if it can be done peaceably and without fraud?

3d. Is section 1007 of the civil code, which attempts to confer title by occupancy, retroactive; and, if so, is it unconstitutional, as being contrary to the inhibition on the powers of the legislature contained in the constitution of this State, and in the fourteenth amendment to the Constitution of the United States, which provide that no person shall be deprived of life, liberty, or property without due process of law?

The transcript in this action shows that the defendant Poppe, in 1851, settled as a pre-emptor on the S. W. quarter of sec. 11, T. No. 4 N., R. 8 east, of Mt. Diablo base and meridian; that afterwards he made due proof of his pre-emption right to the land, and made payment to the United States therefor, on which he received a patent from the United States for the land in November, 1863. Poppe was in
38 the actual possession of only about 50 acres of this quarter section, the residue thereof being in possession of one R. A. Athearn, who claimed the same and other land under a patent issued to him by the State of California.

Shortly after receiving his patent, Poppe commenced an action against Athearn for the possession of the land so held by Athearn, and obtained a judgment for such possession in 1866. Athearn moved

for a new trial, which being denied, he appealed to the supreme court the same year and gave an undertaking on the appeal, which stayed the execution of the judgment. The supreme court reversed the judgment of the court below and sent back the case to that court for a new trial, and the remittitur on such reversal was filed in the lower court in November, 1872.

Athearn died in 1867, and the same year his interest in the land was sold under a decree of foreclosure of a mortgage, given by him to one M. J. Dooley, and one J. J. Valentine became the purchaser on such sale, and received in due time a sheriff's deed for the land.

One S. L. Magee had charge of the land for Valentine, and kept up the fences and cut hay on the land.

In January, 1874, Poppe entered peaceably into the possession
39 of the land, and in August, 1874, he dismissed his said suit for the possession of the land.

The present action was commenced by Valentine in July, 1875. Valentine sold to Langford in 1878, who was substituted as plaintiff.

It does not appear that Valentine was ever substituted as defendant in the action commenced by Poppe vs. Athearn. The evidence on the trial of this action shows that Poppe acquired the true title to the land under his patent from the United States, and that the patent from the State to Athearn conveyed no title to the land, since the State had no title to convey.

The only title on which plaintiff could claim recovery was his claim of title under the statute of limitations of this State, and the provisions of section 1007 of the civil code.

The court below filed its findings of fact, but filed no finding of fact as to adverse possession.

The court below rendered judgment for plaintiff for a portion of the land sued for, and denied defendant's motion for a new trial, and this judgment and order was affirmed in department 1 of this court on the first day of the present month.

The counsel for appellant, in support of this petition, urged the following, viz:

The statute of limitations of this State does not, on its face, purport to give title to the adverse possessor, nor to deprive the true
40 owner of his title, nor to take away from him the right of entry. It simply provides, in effect, that the courts will not assist the true owner in getting possession of the land unless he seeks the remedy by action within the time specified in the statute. The statute of limitations acts only on the remedy, it does not impair the right; it is a shield and not a weapon of offense.

Johnson vs. A. & S. R. R. Co., 54 N. Y., 416.

Higgins vs. Scott, 2 B. & Adolf., 413.

Mason vs. Walker, 14 Maine, 163.

Hunt vs. Bum, 2 Salk., 422.

The statute of limitations affects the remedy only, while prescription affects the right.

Billings vs. Hull, 7 Cal., 1.

We are speaking now of statutes of limitation, which do not, by express provisions, take away rights.

The statute of limitations of James I, did, by express provision, toll or take away the right of entry. The following is the provision of that statute on the subject, viz:

"No person or persons shall, at any time hereafter make any entry into any lands, tenements, or hereditaments but within twenty

41 years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof, such person so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or statute to the contrary notwithstanding."

A similar provision is contained in the statute of limitations of most of the States of the United States, but there is no such express provision in the statute of limitations of this State.

What was known at common law as the right of entry must exist somewhere, and if taken away from the disseisee it must be in the disseisor.

The common-law action of ejectment was simply a possessory action, and although the question of title usually entered in the determination of the action, yet it could only be maintained when the lessor of plaintiff had the right of entry.

Bac. Abr. Eject. (A.) 2; 2 Steph. N. P., 1374.

So that it might happen at common law, that the disseisor who had acquired the right of entry under the statute of limitations of James I, might successfully maintain the action of ejectment against the true owner who had lost the right of entry under the same statute,

42 and be afterwards turned out of possession by the true owner in proceedings under some of the real actions known to the common law.

It will be unnecessary for us to suggest to your honors, that our action to recover the possession of real estate, although commonly called the action of ejectment, has little in common with the common-law action known by that name. Our action of ejectment is more like the real actions at common law stripped of their technicalities.

Under our code of civil procedure, the facts are to be stated without any technical form, and in our action (commonly called ejectment), the ownership or title is directly put in issue, and the true owner must prevail, unless barred by the statute of limitations from commencing the action; and the judgment of the court is conclusive as to title as between the parties to the action and their privies.

The common-law action of ejectment, however, which tried the present right of entry, was never held to be conclusive of title, and successive actions of ejectment could, at common law, be maintained between the same parties, and for the possession of the same land; and this was also the case in those States where the common-law remedies prevailed, and was frequently so held in the State of New York before the adoption of the code of practice in that State.

43 We are aware of the views expressed by Judge Sawyer in his very learned and exhaustive opinions, delivered in the cases of Arrington vs. Liscom, 34 Cal., 365, and Cannon vs. Stockmon, 36 Cal., 540, and although it may seem a matter of great presumption on our part to differ from such an able and learned jurist, yet, as we have given the matter a good deal of thought and investigation, and as, in our opinion, the cases in which Judge Sawyer's opinion was given did not involve the question as to the effect of the statute of limitations on title, which he so ably discussed, and since such question was not embraced in the argument of counsel in those cases, except perhaps incidentally, we trust the court will not deem us too presumptuous if we allude briefly to the cases on which Judge Sawyer seems to have based his opinion, and also to the cases in which that able judge rendered his opinion.

The case of Arrington vs. Liscom was an action to quiet title; the

defendant interposed, as a defense, a cross-action to redeem. To this cross-action the plaintiff demurred, on the ground that the right of redemption was barred by the statute of limitations of this State. The demurrer was sustained on this ground, and the defendant declining to amend, the plaintiff had judgment. The real point before the supreme court in that case was, whether the right of redemption
44 claimed by defendant was barred by the statute of limitations.

In the case of Cannon vs. Stockmon, 36 Cal., 540, the statute of limitations was pleaded by the defendant, who was in possession, as a defense.

In the cases of Drayton vs. Marshall, 1 Rice, Eq. (S. C.), 385; of Bradstreet vs. Huntington, 5 Pet., 538; of Pederick vs. Searle, 5 S. & R., 239; of Leffingwell vs. Warren, 2 Black, 605; of Moore vs. Luce, 29 Pa., 260; Thompson vs. Green, 4 O. St., 223, the statute of limitations was interposed by the defendants, who were in possession, as a defense.

In the case of Jackson vs. Diffendorf, 3 Johns., 269, the statute of limitations was not referred to by the court. The decision of the court in that case was rendered on the sole ground that a survey made and acquiesced in for 38 years as showing the true boundaries of a lot of land was to be presumed to be correct.

In the case of Jackson vs. Rightmyre, 16 Johnson, 313, the court held that a person against whom judgment of ejectment had been rendered in a former action and who was removed from possession under a writ to enforce that judgment, must, in an action of ejectment brought by him against the plaintiff in the former action, show
45 evidence of title additional to that of prior possession to entitle him to recover.

In the case of Jackson vs. Otts, 8 Wend., 440, the court held that a deed which purported to convey land which was, at the time of the execution of the deed in the adverse possession of another person, was void under the laws of that State, and passed no title. The court also held that an adverse possession by one who held the State patent which had conveyed to him the land was entitled to recover in the then action of ejectment. The first ground above mentioned was conclusive in that action, and as the then action of ejectment in that State merely determined the right of entry, the other ground was also probably well taken, although it has been disapproved in a note to a recent edition of Wendell's Reports.

Taylor vs. Horde, 1 Burr, 119, and Stokes vs. Berry, 2 Salk., 421, decided that in the common-law action of ejectment the plaintiff must have the right of entry as well as the right of property.

In Barwick vs. Thompson, 7 Term., 488, the court held that the defendant, having leased the land under a person claiming under plaintiff, could not dispute the plaintiff's title, and further, that a prior possession of 21 years by plaintiff was sufficient title to maintain ejectment against the defendants in that action, who had no title.

46 In Beckford vs. Wade, 17 Vesey, jr., 87, the master of the rolls held that the possessory laws of the Island of Jamaica, unlike the statute of limitations of England, was not merely a bar to the remedy, but, by its terms, it conferred absolute title on the possessor thereunder against all the world, and inferentially he decided that the statute of limitations of England did not confer title against the true owner of land. In Thorn vs. Lee, 5 Geo., 217, the court decided that the statute of limitations was a defense to the holder of slaves who claimed owner-

ship, and of like effect is the case of Newcomb vs. Leavitt, 22 Ala., 631. In the case of School District vs. Benson, 31 Maine, it did not appear clearly that the defendant was the owner of the property sued for, and the only point argued in that case was whether plaintiff who had held the land sued for twenty years, claiming to be the owners, had by simple abandonment, deprived themselves of their claim to the possession of the land.

By the laws of that State the right of entry was expressly taken away from the owner by an adverse possession of twenty years, and in the action of ejectment in that State the right of entry was alone tried. (See Mason vs. Walker, 14 Maine, 163, hereinbefore cited.)

47 We have examined the foregoing cases and other cases carefully, and we have not in our research found a single case in which the question of ownership was squarely put in issue, where any court ever held before the present case, that the true owner of land who has peaceably obtained possession thereof, could be deprived of such possession through an action brought by the prior adverse holder of the possession of the land.

Section 34 of the present statute of William IV, extinguishes the title of the true owner, unless he makes entry or brings an action within the time prescribed by said statute. This statute was not declaratory of the common-law rule. Similar statutes have been passed in other States, and a similar provision is contained in section 1007 of our civil code, which took effect in January, 1873.

We are not now discussing the effect of such statutes, but we claim it to be settled law that unless there be some express provision of the statute to the contrary, statutes of limitation affect only the remedy, and take away no right, and the right of the owner of property who is in possession thereof, is to have the use and enjoyment thereof.

48 It is held as undoubted law that the opinion of a court is to be interpreted by the facts of the case in which the decision is rendered, and that the decision of a court is only authority on such questions as are actually and necessarily decided in a case; as to all other questions discussed by a court in its opinion, although entitled to very great respect, the opinion of the court as to such questions has not the weight of authority.

Wells on Res Adjudicata and Stare Decisis, sec. 581, and cases there cited.

We do not dispute that in one sense a person acquires title by adverse possession. Lord Coke defines a title as "justa causa possidendi id quod nostrum est." In other words, it is the means whereby the owner of lands hath the just possession of his property.

The adverse holder of lands who can and does invoke the statute of limitations in his defense in an action brought against him, finds the statute to be a means of keeping him in possession of the property, and to that extent it can be properly called a title.

But it has never been held, previous to this action, so far as our research has enabled us to discover, that the statute of limitations, unless so expressly made by statute, has been used as a sword, in a case

49 in which ownership is squarely in issue, to drive the true owner from the possession of his land.

The attorney for appellant understood the decisions of this court in the cases of McCreery vs. Sawyer, 52 Cal., 257, and of McCreery vs. Duane, 52 Cal., 262, to be in effect that the statute of limitations of this State did not confer title.

In the first of those cases the defendant in his answer, alleged owner-

ship and right of possession in himself, and in the second of those cases the defendant interposed a general denial to the complaint, which was not verified. The court held that evidence of adverse possession for five years before the action was not admissible under these answers. The attorney for the appellant in this action was of the opinion that the court must have held that adverse possession did not confer ownership, even on a defendant; otherwise the evidence of adverse possession for five years would have been admissible under the answers, or at least under the answer in the first of the actions, which alleged ownership and right of possession in the defendant in that action as clearly as the complaint of plaintiff alleges ownership and right of possession in this.

The attorney for the appellant in this action being misled by his understanding of the effect of the decisions in those cases, did
50 not prepare for the argument of this case before department 1 of this court, as fully as he otherwise would have done, nor as fully as the importance of the questions involved in the case demanded.

Counsel for appellant are of the opinion, that when appellant peaceably took possession of the land in January, 1874, and during the pendency of the former action, he was in law entitled to take and keep such possession.

He is shown by the evidence in this case to have had the true legal title to the land and the right to its possession. Unless he had such right he could not have recovered in that action. If he had a right of possession which was preserved and kept in force by that action, he certainly had the right to take peaceable possession of the land if he could.

2 Bla. Com., 5.

1 Bing., 158.

In determining whether the taking of such possession was legal, the court is to consider what his rights were at that time, and his then rights could not be affected by a subsequent dismissal of the action, which dismissal in effect determined and affected no previous rights.

After defendant had taken possession of the land he was not
51 entitled to any judgment for the possession thereof, because the court would not give him a judgment for the recovery of the possession of that which he already had.

By the dismissal of the action he merely abandoned his claim to his costs in the action.

Section 1007 of the civil code, which took effect in January, 1873, and which is mentioned in the opinion of department 1 of this court, rendred in this action, if intended to be retroactive, is unconstitutional as being contrary to the provisions of sec. 8 of Art. I of the old constitution of this State, and as being contrary to the provisions of Amendment XIV to the Constitution of the United States.

Taylor vs. Porter, 4 Hill, N. Y., 145.

4 Dev., 15.

2 Kent Com., 13.

If this section is not retroactive it cannot affect the defendant in this action since only about one year elapsed between the time the section took effect and the time appellant took possession of the land, and only two and a half years elapsed between the taking effect of the section and the commencement of this action.

Counsel for appellant have referred but sparingly in this petition to recent elementary works on law, since the experience of counsel
52 has been very frequently to find that the doctrines enunciated as

law by the authors are not supported by the reported cases to which such authors have made reference.

Counsel for appellent have not been able to give as much attention to the questions involved in the present case as their importance demands, but believing that in justice and on the law the judgment of the court below should be reversed, and inasmuch as the questions involved in this case have never previously been squarely raised, nor fully argued by counsel in the courts of this State; nor so far as the counsel for appellant can discover, by counsel in any case, and as this case must serve as a precedent, counsel for appellant most respectfully and earnestly ask that this case be heard before the court in banc.

J. H. BUDD,
Att'y for Appellant.

GREATHOUSE & BLANDING,
Of Counsel.

53 B. F. LANGFORD, PLAINTIFF AND RESPONDENT, *vs.* BERNARD POPPE, DEFENDANT AND APPELLANT. } 6608. In bank.

OCT. 30TH, 1881.—Petition for rehearing in bank denied.
By the court.

54 *Bond on writ of error.*

In the Supreme Court of the United States.

B. POPPE, PLAINTIFF IN ERROR, *vs.* B. F. LANGFORD, DEFENDANT IN ERROR.

Know all men by these presents that we, B. Poppe, as principal, and Charles Poppe and M. E. Bryant, as sureties, are held and firmly bound unto B. F. Langford, defendant in error, in the sum of four thousand dollars, gold coin of the United States of America, to be paid to the said B. F. Langford, his executors or administrators.

To which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 29th day of November, A. D. 1880.

Whereas the above-named B. Poppe has prosecuted a writ of error to the Supreme Court of the United States to reverse the judg-
55 ment rendered by the supreme court of the State of California, in the action entitled B. F. Langford versus B. Poppe—

Now, therefore, the condition of this obligation is such that if the above-named B. Poppe shall prosecute his said writ of error to effect, and *and* answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

B. POPPE. [SEAL.]
CHARLES POPPE. [SEAL.]
his
M. E. + BRYANT. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—
R. E. WILHOIT,
J. H. BUDD.

Witness to signature of M. E. Bryant—
R. E. WILHOIT.

STATE OF CALIFORNIA,
County of San Joaquin, ss:

Charles Poppe and M. E. Bryant, sureties to the foregoing bond being duly sworn, each for himself deposes and says that he is a householder and resident in the State of California, and is worth the sum of four thousand dollars, exclusive of property exempt from execution and over and above all just debts and liabilities.

CHARLES POPPE.
his
M. E. + BRYANT.
mark.

Witness to signature of M. E. Bryant—
R. E. WILHOIT.

Subscribed and sworn to this 29th day of November, A. D. 1880.
[SEAL.] ROLEY E. WILHOIT,
Notary Public.

The form of the within bond and the sufficiency of the sureties thereon are hereby approved.
Dated Nov. 30th, A. D. 1880.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

Written on margin of folio 54.

(Indorsed:) Filed November 30th, 1880. Frank W. Gross, clerk.

56 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between B. Poppe, plaintiff in error, and B. F. Langford, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of November, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk of U. S. Circuit Court, Dist. of California.

The above writ of error is hereby allowed.

R. F. MORRISON,
Chief Justice of the Supreme Court of the State of California.

57 The answer of the justices of the supreme court of the State of California.

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained in a certain schedule to the writ annexed as within we are commanded.

By the court.

[SEAL.] FRANK W. GROSS, *Clerk.*

(Indorsed:) United States. N . Supreme Court. No. . B. Poppe, plaintiff in error, vs. B. F. Langford, defendant in error. Writ of error. Filed November 30th, 1880. Frank W. Gross, clerk of the supreme court of California.

58 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To B. F. Langford, defendant in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1881, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein B. Poppe is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30' day of November, A. D. 1880, and of the Independence of the United States the one hundred & fifth.

{ SEAL OF SUP. COURT, } R. F. MORRISON,
{ STATE OF CAL. } *Chief Justice of the Supreme Court of the State of California.*

59 Due service of the within citation is hereby admitted this 14th day of December, 1880.

D. S. TERRY,
Attorney for B. F. Langford, Defendant in Error.
B. F. LANGFORD,
Defendant in Error.

(Indorsed:) United States Supreme Court. B. Poppe, plaintiff in error, vs. B. F. Langford, def't in error. Citation. Filed November 30th, 1880. Frank W. Gross, clerk of the supreme court of California.

60 In the supreme court of the State of California.

B. POPPE, PLAINTIFF IN ERROR,
vs.
B. F. LANGFORD, DEFENDANT IN ERROR. } 6608.

I, Frank W. Gross, clerk of the supreme court of the State of California, do hereby certify that the foregoing fifty-seven pages, numbered from 1 to 57, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

In witness whereof I have hereunto set my hand and affixed the seal of the said supreme court this 15th day of July, A. D. 1881.

[SEAL.] FRANK W. GROSS, *Clerk*,
By C. HARLAN, *Deputy*.

61 *Assignment of errors and prayer for reversal.*

In the Supreme Court of the United States. Of the October term, in the year of our Lord one thousand eight hundred and eighty-one.

B. POPPE, PLAINTIFF IN ERROR,
vs.
B. F. LANGFORD, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said B. Poppe, plaintiff in error, by C. R. Greathouse and J. H. Budd, his attorneys, and says—

That in the record and proceedings aforesaid there is manifest
62 error in this, to wit, that the complaint and declaration aforesaid, and the matters therein contained. are not sufficient in law for the said B. F. Langford, defendant in error, to have or maintain his aforesaid action thereof against the said B. Poppe, plaintiff in error.

And that there is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said B. F. Langford, defendant in error, against the said B. Poppe, plaintiff in error, whereas by the law of the land said judgment ought to have been given for the said B. Poppe, plaintiff in error, against the said B. F. Langford, defendant in error.

And that there is also error in this, to wit, that the court erred:

First. In overruling the objection of the plaintiff in error to the patent offered in evidence by the defendant in error.

Second. In overruling the objection of the plaintiff in error to
63 the question asked by defendant in error of the witness McDowell, as to declarations made by the sons of P. A. Athearn, as to the person for whom he held possession of the land.

Third. In overruling the objection of plaintiff in error to the question asked the witness Magee, by the defendant in error, as to the declarations of Miller, as to the person for whom he held possession of the land.

Fourth. In denying the motion of plaintiff in error for a nonsuit.

Fifth. In deciding and adjudging that occupancy and possession for the period prescribed by the statute of limitations of the State of California transferred to B. F. Langford, defendant in error, the title of B.

Poppe, plaintiff in error, and conferred absolute title on the said Langford, inasmuch as in so deciding and adjudging the said court deprived said Poppe, plaintiff in error, of his property without due pro-
64 cess of law, contrary to the fourteenth amendment to the Constitution of the United States.

The plaintiff in error will rely on the following as the particulars in which the evidence is insufficient to justify the findings and judgment of the court, viz:

First. The evidence fails to show that the defendant in error is or ever was the owner of the land sued for, or of any part of it.

Second. The evidence fails to show that the defendant in error, or his grantor Valentine, is or ever was entitled to the possession of the land sued for, or to any of it, and fails to show that the defendant in error, or his said grantor, is or ever was entitled to the rents, issues, and profits of said land, or of any part thereof.

65 Third. The evidence shows that the only title or claim of title of the defendant in error to the land sued for, is under the patent from the State of California, read in evidence, and the evidence fails to show that said State ever had any title to said land or to any of it.

Fourth. The evidence shows that said land was agricultural public land of the United States, and that while such, the plaintiff in error settled thereon as a pre-emptor under the pre-emption laws of the United States in 1851; and that the plaintiff in error, as such pre-emptor, resided on, and improved and cultivated said land ever since 1851; that he has fully complied with the requirements of the pre-emption laws of the United States, and has proved up as such pre-emptor, his right to said land, under said settlement, residence, and improvement, and paid for said land and received a patent from the United States, granting and conveying to him said land by reason of his said pre-emption
66 right thereto, and the evidence shows that his right as such pre-emptor to said land is prior to any right or claim of title of P. A. Athearn (under whose title defendant in error claims) in or to said land.

Fifth. The evidence fails to show any right or title of said Athearn to said land prior to said pre-emption right of plaintiff in error thereto.

Sixth. The evidence shows a right of plaintiff in error as a pre-emptor to said land prior to any right thereto of said Athearn (under whose title the only claim of title of the defendant in error to said land is) and the evidence shows that plaintiff in error kept good and perfected his said pre-emption right to said land, and by reason thereof received his said patent therefor from the United States.

Seventh. The evidence fails to show that the defendant in error ever acquired any title to or right of possession of said land or any of
67 it under or by virtue of the statute of limitations of the State of California.

Eighth. The evidence fails to show that the plaintiff in error ever withheld from the defendant in error or his grantor, any of said lands lying northerly of the Mokelumne River. And the evidence fails to show that defendant in error, was ever the owner or entitled to the possession of any of the land sued for which lies north of said river, either by the possession of himself and grantors, by the statute of limitations of the State of California, or otherwise.

Ninth. The evidence shows that plaintiff in error was the owner and entitled to the possession of all the land sued for, and while he was such owner and entitled to the possession of said land he acquired peaceably the possession of all of said land lying north of the Moke-

lumne River, and the evidence fails to show that his right to such
68 possession was ever barred or taken away by the statute of limitations of the State of California.

Wherefore the said B. Poppe, plaintiff in error, prays that the judgment aforesaid, may be reversed, annulled, and altogether held for nothing, and that the said plaintiff in error, may be restored to all things which he hath lost by occasion of the said judgment, etc.

C. R. GREATHOUSE AND J. H. BUDD,
Attorneys for Plaintiff in Error.

(Indorsement on cover:) No. 953. B. Poppe, plaintiff in error, vs. B. F. Langford. California sup. court. Filed October 5th, 1881.

REC. 953—3

SUPREME COURT U. S.
FILED
JAN 23 1932
JAMES H. McKENNEY, Clerk

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

BERNARD POPPE,
Plaintiff in Error,
vs.
B. F. LANGFORD,
Defendant in Error.

ERROR TO THE SUPREME COURT OF CALIFORNIA.

Brief of Plaintiff in Error on Motion to Dismiss.

STATEMENT OF THE CASE.

The action is one of ejectment brought by one John J. Valentine for the recovery of the possession of a tract of land, situated in the County of San Joaquin, California.

Valentine, the original plaintiff, in the action in the State Court, alleged in his complaint, owner-

ship in fee of the said land sued for and ouster by defendant in that Court, who is the plaintiff in error.

Defendant, the plaintiff in error, in his answer to the complaint denied each and every allegation of the complaint, and alleged ownership in fee, of the land in himself. Before the trial of the action Langford, the defendant in error, was duly substituted in the State Court as plaintiff in the action in place of Valentine On the trial of the action the defendant relied to sustain his allegation of ownership in fee, on title derived by him through certain mesne conveyances from one T. A. Atheam, who claimed the land under a patent issued to him by the State of California, on the 8th day of January, A. D., 1862, and on title acquired by adverse possession by his grantors under section 1007 of the Civil Code of California which took effect January 1st, 1873, and also claimed title by virtue of the statute of limitations of California.

The plaintiff in error, on the trial introduced evidence to show ownership of the land in fee in himself, his right to the land, which was initiated by his settlement thereon in person as a pre-emptor in August 1851, and was followed by a full compliance on his part with the pre-emption laws of the United States, and a patent issued to him by

the United States in November 1863, by reason of his said pre-emption right thereto.

It appeared in evidence on the trial of the action, that the plaintiff in error, after the issuance of that patent and in the year 1864, commenced an action in the proper State Court to recover possession of the land, for the possession of which the defendant in error had judgment in this action, against said Athearn who was then in possession of the land, and that during the pendency of that action, he obtained peaceably the possession of the land in January 1874, and having thus peaceably obtained possession of the land and being in possession of it, his attorney in the action in August 1874, dismissed the action.

The present action was commenced July 11th, 1875.

The District Court in which the present action was tried, found that Valentine was the owner of the land on the 1st. day of February 1874, and at the time of the commencement of the action, and this was the final judgment of the Supreme Court of the State of California.

The Supreme Court of the State of California in its opinion among other things says :—"even if the adjudication left the matter in doubt, section 1007 of the Civil Code provides, occupancy for the period prescribed by the code of civil proced-

ure, as sufficient to bar an action for the recovery of property confers a title thereto."

See 56 California report. page 75.

This part of the opinion is not in the brief of the defendant in error.

Citation of Points and Authorities.

The plaintiff in error claims title to the land under a right thereto derived from a patent of the United States, and which right is secured to him by the provisions of section I, Article XIV of the Constitution of the United States, which was declared ratified July 28th, 1868.

And the Supreme Court of the United States has jurisdiction on writ of error to review the decision of the Supreme Court of California, which deprived the plaintiff in error of such right. U. S. Revised Statutes, Section 709.

Section 1007 of the Civil Code of California which went into effect January 1st, 1873, did not deprive the plaintiff in error of his right to the land because it is not retroactive,

Section 2 and 3 of said Civil Code.

The Supreme Court of California must therefore have given a construction to the Statute of limitation of the State of California, that "no action for the recovery of real property or for the recovery of the possession thereof, can be maintained unless

it appear that the plaintiff, his ancestor, predecessor or grantor was siezed or possessed of the property in question within five years before the commencement of the action," (Code Civil Pro., Sec. 318.)—that such statute absolutely deprived the owner of the property of his right thereto, unless such owner brought his action for the possession of the property and recovered final judgment for such possession within five years after he acquired title from the United States.

Because, if Poppe at the time he took possession of the property, was owner and had the right of possession, he was entitled to take possession, if it could be done peaceably.

2. Bla. Com. 5.

1. Bing. 158.

Dennis vs Wood 48 Cal. 361.

Thompson vs Smith 28 Cal. 422.

Unless Poppe was the owner and had the right of possession, he could not recover judgment for possession in said action of Poppe vs Athearn.

If he had the right of possession he was entitled to judgment for the possession, and if he was entitled to such judgment for the possession, he had a right to take possession, if it could be done peaceably.

So that unless the Statute of limitations of

California took away Poppe's right of possession so as to defeat his then pending action, he took possession of the land rightfully, and is protected in that right by his patent from the United States and by the XIV amendment to the constitution of the United States.

A statute whieh seeks to deprive a person of such right is unconstitutional and void.

Groesbeck vs Seeley 13 Mich. 329.

Arrowsmith vs Burlingim 4 McLean 489.

In this case, the laws of California, of which we complain, being contrary to the provisions of the XIV amendment of the Constitution of the United States, does not furnish a rule of decision in this case.

Rev. Statute of U. S. Sec. 720.

At the time of the decision of Leffingwell vs Warren, 2 Black 599, this amendment to the Constitution of the United States did not exist.

The motion of the defendant in error to dismiss, should be denied.

GREATHOUSE & BLANDING,
and J. H. BUDD.
Attorneys for Plaintiff in Error.

T. Christie
of Counsel

SUPREME COURT U.S.
DEC 1 1902
JAMES H. MCKENNEY, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

BERNARD POPPE,
Plaintiff in Error,

vs.

B. F. LANGFORD,
Defendant in Error.

ERROR TO THE SUPREME COURT OF CALIFORNIA.

Brief of Defendant on Motion to Dismiss.

Statement of Case.

The defendant in error recovered judgment in one of the District Courts of California for the possession of the tract of land described in the record, on appeal to the Supreme Court the judgment was ~~offered~~ affirmed. The facts disclosed by the record are, that in November 1863, a patent for said land was issued by the United States to the plaintiff in error. That at the time of the issu-

The case shows that Athearn had actul and exclusive possession, claiming title of all the land in controversy, except about seven acres lying south of the river, from some time in the year 1856, until his death in 1867. January 6, 1862 the State of California issued a patent for the land to Athearn purporting to convey it as a part of the 500,000 acres grant to the State by Act of Congress. The case also shows that after the death of Athearn the premises remained in the actual and, as against all the world except the heirs of decedent, adverse possession of the administrator of the estate of Athearn until the execution of a Sheriff's deed thereof (based upon judgment for mortgage foreclosure and execution duly rendered and issued against the said administrator in his capacity as such), to one Valentine, by whom it was held in like possession until the entry of defendant in January 1874, and that the land was afterwards conveyed by Valentine to plaintiff.

Defendant claims title and the right of possession under a patent from the United States, issued to him in November 1863. In 1864 defendant commenced an action of ejectment against Athearn to recover possession of the lands here in controversy, and after certain proceedings therein had, in 1866 a judgment was rendered in the District Court in his favor for the recovery of the premises. Athearn appealed from the judgment and gave an undertaking to stay execution during the pendency of the appeal. The Supreme Court reversed the judgment and ordered a new trial, and the remitter was filed in the District Court in November 1872. In August 1874 the said action of ejectment was dismissed.

It is now claimed by appellant that the run-

ning of the period prescribed by the Statute of Limitations was interrupted during the pendency of the action of ejectment wherein he was plaintiff, and that plaintiff and his predecessors therefore have never had five years continuous adverse possession since the defendant received his patent in November 1863.

The acquisition of a right by adverse possession depends upon the adverse holding of the person claiming the right and not simply upon the acts of one claiming a paramount title who has been in a position to assert his title during the statutory period. The dismissal of defendant's action of ejectment terminated his right to claim anything by virtue of the action; and the fact that plaintiff and his predecessors contested the action and refused to surrender the possession only tend to prove that their possession was *adverse.*

From the date of the patent to Athearn in 1862, he and his successors held under *color* of title. Plaintiff therefore by virtue of his actual adverse possession of the rest of the tract sued for under the patent was entitled to recover the strip of land included within the calls of the patent, south of the river, which was in the actual possession of no one until the entry by defendant.

Judgment and order affirmed.

We concur. Ross, J., McKee, J.

Points for Defendant in Error.

We submit that this Court has no jurisdiction of the questions involved in the case; that the writ of error was improvidently awarded and should be dismissed.

Citation of Authorities.

The case of McManus vs. O'Sullivan, 91 U. S. 578, is conclusive on the question of jurisdiction. In that case as in this, the defendant in error claimed title by adverse possession under the Statute of Limitations.

This Court held the question to be "within the exclusive jurisdiction of the State Courts and not subject in any manner to re-examination" by this Court. 91 U. S. 578.

This Court when it manifestly has no jurisdiction over the matter in controversy, will entertain a motion to dismiss a writ of error at any time.

Clark vs. Hancock, 94 U. S. 493.

C. T. BOTTS
and D. S. TERRY,
for Defendant in Error.